

1/11/2023 | Articles

## GESA: The Intersection of Pennsylvania's Separations and Guaranteed Energy Savings Acts

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Every architect, engineer, and contractor interested in bidding public projects must by now be familiar with Pennsylvania's Separations Act, 71 P.S. § 1618, which requires owners to use a multi-prime project delivery system and competitively bid plumbing, heating, ventilating, and electrical work. What they may not be familiar with is the Guaranteed Energy Savings Act, 62 Pa.C.S. §§ 3751-3758 (the "GESA").

Adopted in 1998, the GESA provides a limited exception to the separation requirements: public entities may award "guaranteed energy savings contracts" for "the evaluation and recommendation of energy conservation and for implementation of one or more such measures" through a simple request for proposal process. 62 Pa.C.S. §§ 3752-3753.

In order to award such a contract, however, the owner must find that the amount expended on the "energy conservation measures" recommended in the proposal **must not exceed** the amount of energy, water or wastewater cost savings, operational cost savings or revenue increases resulting within a period not to exceed 20 years from the date of final installation. See 62 Pa.C.S. § 3753(d). Energy conservation measures include any "program, facility alteration or technology designed to reduce energy, water, wastewater or other consumption or operating costs," such as insulation, storm windows, computerized energy control systems, HVAC modifications, etc. 62 Pa.C.S. § 3752.

In a vacuum, although they impose a sophisticated calculation upon those issuing proposals, these parameters seemingly provide a clear exception to the Separations Act. The GESA collides with the Separations Act, however, by permitting guaranteed energy savings contracts to include improvements that are not causally connected to energy conservation measures in certain circumstances.

Such correspondent improvements may be included if: (1) the total value of the improvement does not exceed 15% of the total value of the guaranteed energy savings contract; and (2) either the improvement is necessary to conform to a law, a rule or an ordinance or there is some other economic advantage for the improvement. 62 Pa.C.S. § 3752(d). In addition, facility alterations which include expenditures that are required to properly implement other energy conservation measures may be included as part of a guaranteed energy savings contract and such installation may be supervised by the contractor performing the guaranteed energy savings contract. 62 Pa.C.S. § 3756(e).

That certain components of the proposed construction may be unrelated to energy conservation measures has caused confusion amongst those seeking to reconcile the Separations Act with the GESA. According to the Department of Education, the GESA plainly "does not require 'separation' of contracts." In an unreported opinion, however, the Commonwealth Court called into question whether and to what extent the Separations Act is truly superseded by the GESA. See *Wescott v. Del. Cty. Intermediate Unit*, No. 781 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 878 (Pa. Commw. Ct. Nov. 18, 2017).

In *Wescott*, the owner of an electric company filed a taxpayer lawsuit to enjoin the Delaware County Intermediate Unit from awarding a \$38,000,000 contract for "the construction of two new additions that would be connected to an

existing structure, the removal of a boiler system in that structure, and a new centralized HVAC system that would serve all three connected structures.” *Id.* at \*1–2. Viewing such a contract as an overreach of the GESA, Wescott argued that separate bids were required under the Separations Act. *Id.* at \*2.

The trial court disagreed and found that the project fit squarely within the provisions of the GESA. It explained that the project encompassed “energy conservation measures” as defined in the GESA, describing it as “a centralized HVAC system for all three structures ... created by first demolishing a boiler system in an existing structure” and replacing it “with a centralized system centered in the existing structure which will then be extended to the new structures via a labyrinth of pipes, coils, electrical wiring and all the other attendant equipment and electrical supplies and hook-ups necessary for the unified system.” *Id.* at \*4–5 (internal citations and quotation marks omitted). In the trial court’s eyes, the GESA operated as a complete and total exception to the requirements of the Separations Act. *Id.* at \*5.

On appeal, Westcott argued that the trial court erred in: failing to require the county to publicly bid and award the HVAC, electrical, and plumbing contracts in accordance with the Separations Act; holding that the Separations Act was superseded by the GESA; and holding that the requirements for implementation of the GESA were met. *Id.* at \*6. Unlike the trial court, the Commonwealth Court was not persuaded that the Separations Act and the GESA were in conflict; rather, it explained that “these statutes can function together such that effect could be given to both, thereby obviating the need for any statutory construction analysis.” *Id.* at \*10–11. It explained:

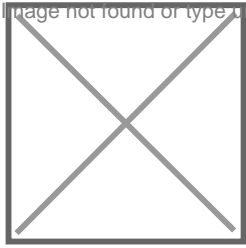
The Separations Act generally requires separate bidding and award of contracts to the lowest responsible bidder for any construction or alteration of a public building that exceeds \$4,000.00. GESA’s application is very narrow and limited to specific situations involving energy, water, or wastewater projects which would result in a cost savings that would effectively pay for the projects themselves. The fact that a project may include an element of energy, water, or wastewater savings does not make the entire project subject to GESA. Indeed, in this case, the [county] could have bid out the construction of the additions separately in accordance with the Separations Act and limited the GESA project to demolition of the existing boiler system and replacement with a centralized HVAC system.

*Id.* at \*11.

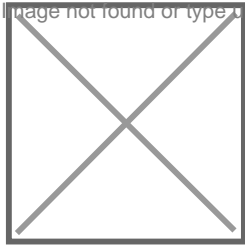
Nevertheless, the Commonwealth Court affirmed the trial court’s denial of the preliminary injunction because Wescott “failed to establish that greater injury will occur from refusing to grant the injunction and that the public interest will not be harmed if an injunction were to be granted.” *Id.* at \*11–12. More specifically, the delays caused by the injunction would result in increased costs to the county, such as costs for new specifications for bids, mobilization costs, material costs, and facility costs to house and teach its students. *Id.* at \*12.

Among the takeaways from *Wescott* is that proposals for guaranteed energy savings contracts must be carefully orchestrated so as not to run afoul of the Separations Act. Failure to comply could subject you to taxpayer lawsuits seeking injunctive or other relief.

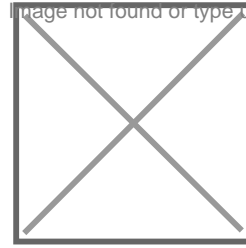
Attorneys William D. Clifford; W. Alan Torrance, Jr.; and George Dylan Apessos and the Construction Law Group at Dickie, McCamey & Chilcote, P.C. are on standby to assist —whether you’re an architect, engineer, or contractor preparing bid packages in compliance with the GESA or a taxpayer seeking to enforce the Separations Act.



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